

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-219584 **DATE:** October 25, 1985  
**MATTER OF:** Minnco, Inc.

**DIGEST:**

A government contract may not knowingly be awarded to a business that is substantially owned or controlled by a government employee. Although the agency may properly invoke an exception to this rule where there is a most compelling reason to do so, such a determination is a discretionary matter, and no abuse of discretion is found where the agency declines to invoke the exception even though doing so would result in cost savings and promote competition.

Minnco, Inc., protests the Defense Logistics Agency's (DLA) termination after award of contract No. DLA700-85-D-0063 and DLA's refusal to conduct any further negotiations with Minnco after the termination. The protester argues that DLA's determination that Minnco was ineligible to receive the award because the firm is substantially owned or controlled by a government employee was improper because an exception to the general policy against such awards is applicable.

For the reasons set forth below, we deny the protest.

**Background**

On October 29, 1984, DLA issued request for proposals (RFP) No. DLA700-85-R-0165, which contemplated the award of a 1-year requirements contract for shower head assemblies. Prior to issuing the RFP, the Agency had determined that competition by sealed bidding would be impracticable, since it knew of only one source for the item (Speakman) and informal market surveys did not reveal other potential sources. The record indicates that although offers were solicited from 51 firms, only two offerors submitted proposals: Speakman Co., the previous supplier of this equipment, and Minnco.

Minnco is a corporation that manufactures low-flow shower equipment. Its president, Charles Kelly, also owns 49 percent of Minnco's stock and is the co-owner of a patent on a shower head assembly that meets the specifications of the RFP. Mr. Kelly also is employed as an engineer by the David W. Taylor Naval Ship Research and Development Center, a federal government facility.

Minnco submitted the low offer and was awarded the contract. Speakman protested this award to the Agency on the basis of an alleged conflict of interest due to Mr. Kelly's government employment. DLA determined that the award violated Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1984), which prohibits knowingly awarding a contract to a government employee or to a firm that is substantially owned by a government employee.<sup>1/</sup> Consequently, the Agency terminated Minnco's contract for convenience.

Mr. Kelly offered to resign his government job if the Agency would reinstate Minnco as the awardee. The Agency declined to do so and maintains that it would not be appropriate to reopen negotiations with Minnco as long as Mr. Kelly is a government employee.

DLA has advised in its report that it intends to reexamine the solicitation drawings for possible revisions that could increase competition. It then intends to resolicit the requirement using sealed bid procedures.

#### Analysis

FAR, 48 C.F.R. § 3.601, provides that:

" . . . a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the

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<sup>1/</sup>A preaward survey had revealed Mr. Kelly's status as a government employee, but for reasons that are unclear from the record, the agency proceeded with award to Minnco.

appearance of favoritism or preferential treatment by the Government toward its employees."

An exception is provided at FAR § 3.602:

"The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in § 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met."

Minnco asserts that its lower cost, coupled with the government's interest in promoting competition for the supply of shower head assemblies, constitutes a compelling reason for authorizing an award to the firm. Minnco emphasizes that Speakman's estimated cost was approximately 66 percent higher than Minnco's and contends that Speakman will have a monopoly if Minnco is eliminated as a competitor.

We note that FAR § 3.601 implements a well-established government policy that contracts between the government and its employees are undesirable because, among other reasons, they invite criticism as to alleged favoritism and possible fraud. See Valiant Security Agency, 61 Comp. Gen. 65 (1981), 81-2 CPD ¶ 367. This policy is intended to avoid even the appearance of favoritism or preferential treatment toward a firm competing for a government contract; therefore, contracts with government employees should be authorized only in exceptional circumstances. See Valiant Security Agency, B-305087.2, Dec. 28, 1981, 81-2 CPD ¶ 501.

Although Minnco emphasizes that the Agency would enjoy significant cost savings by contracting with Minnco, we have found that cost savings alone do not outweigh the strong public policy against the government contracting with its own employees. Elogene Thurman, B-206325, May 24, 1982, 82-2 CPD ¶ 487; 55 Comp. Gen. 681, 683 (1976). Furthermore, we do not think that Speakman's alleged monopoly, even when coupled with the cost savings associated with Minnco's proposal, provides any basis to conclude that the contracting officer's decision not to invoke the exception was improper in this case. While Minnco's argument that the contracting officer could have justified invoking the exception here may be correct, the fact remains that such a determination is a discretionary matter, and we find nothing in the record to support a conclusion that the contracting officer abused his discretion.

Furthermore, the Agency now states that it intends to resolicit the requirement using sealed bid procedures, after examining the drawings and revising them, where possible, in order to increase competition. It thus appears that the Agency now expects to obtain additional competition for the requirement. Under these circumstances, we consider Minnco's assertion that the Agency's actions place Speakman in a monopoly situation to be speculative.

Minnco also protests that DLA should be required to conduct further negotiations with the protester for the reaward of the contract in light of Mr. Kelly's offer to quit his government job if the government will reaward to Minnco at its original price. The Agency contends, however, that this would not be appropriate since the contract was terminated because of Mr. Kelly's status as a government employee, and that status has not changed. Although Minnco is correct that the FAR specifically prohibits only the award of a contract to a government employee, and thus does not prohibit the preaward negotiations that Minnco requests, there is no requirement that the government engage in such negotiations. Moreover, we find nothing unreasonable in the Agency's reluctance to reopen negotiations with Minnco since the circumstances that led to the termination of the original contract have not changed.

The protest is denied.

*for Seymour Efron*  
Harry R. Van Cleave  
General Counsel